IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

CRYSTAL J. CONANT,

Debtor.

No. 01-24081
Chapter 7

CRYSTAL J. CONANT,

Plaintiff

v.

Adv. Pro. No. 03-2031

UNITED STATES OF AMERICA, DEPARTMENT OF EDUCATION; and STATE OF IOWA, DEPARTMENT OF REVENUE AND FINANCE and IOWA COLLEGE AID,

Defendants.

[on appeal E.D. Tenn.]

MEMORANDUM

This student loan dischargeability proceeding is before the court on the defendants' motions for summary judgment. Because the court concludes based on the evidence tendered that there are no material facts in dispute and the defendants are entitled to judgment as a matter of law, the motions will be granted. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I).

I.

On December 4, 2001, the plaintiff Crystal J. Conant ("debtor") filed for bankruptcy relief under chapter 7. The debtor's schedules listed $73,590 in assets, principally consisting of her home with a stated value of $70,000 and a 1993 Mustang automobile worth $2000. Liabilities totaled $114,959, including one secured debt of $68,000 represented by a lien on the residence. Of the $46,959 in unsecured debt, all but $100 was student loan obligations. The bankruptcy case proceeded uneventfully, and on March 11, 2002, this court granted the debtor a discharge and thereafter closed the case.

On July 1, 2003, after requesting and obtaining the reopening of her bankruptcy case, the debtor commenced the instant adversary proceeding against the defendants, the United States of America and the State of Iowa. The debtor alleges in the complaint that the defendants made educational loans to her in the early to mid-1990's, that these loans have outstanding balances of approximately $10,000 and $27,000, and that repayment of these loans would impose an undue hardship on her such that the loans should be discharged pursuant to 11 U.S.C. § 523(a)(8). After filing answers to the complaint, the defendants each moved for summary judgment, with the defendant United States of America filing its motion on December 13,

2003, followed by the motion of Education Credit Management Corporation, assignee of Iowa College Student Aid Commission ("ECMC"), on December 31, 2003.

In support of its motion, the United States has submitted a memorandum of law which contains a Facts section consisting of 23 numbered paragraphs. Attached as exhibits to the memorandum are: (1) Exhibit A, which is the deposition transcript of the debtor; (2) Exhibit B, the deposition transcript of the debtor's father Lloyd Conant; (3) Exhibit C, the promissory note from the debtor to her father and the deed of trust whereby she gave him a mortgage on her home; (4) Exhibit D, a statement prepared by the debtor of her income and expenses from November 2000 through September 2003; (5) Exhibit E, copies of the documents relating to the United States' loan to the debtor; (6) Exhibit F, a certificate of indebtedness which indicates that the debtor's total debt to the United States as of July 14, 2003 was $7,744.59; (7) Exhibit G, the debtor's bankruptcy schedules and statement of affairs; (8) Exhibit H, the discharge order along with other pleadings in the bankruptcy case and this adversary proceeding; and (9) Exhibit I, United States Dept. Of Education Loan Repayment Options.

In response to the United States' motion, the debtor filed a Memorandum of Law and Facts wherein she states that she "has reviewed the Statement of Facts and the attachments to the Memorandum of the United States of America and does not dispute the facts or the authenticity of the exhibits attached thereto." The debtor contends, however, that the summary judgment motion should be denied because the "evidence shows that there is a genuine issue as to the debtor's ability to repay her debt to the government considering the totality of her circumstances and considering the fact that the Court has a range of options at its disposal."

To support its motion for summary judgment, ECMC has attached to its memorandum of law a copy of the debtor's response to certain requests for production of documents. The debtor has filed a response to ECMC's motion, asserting that the motion should be denied for the same reasons set forth in her response to the United States' motion and because the motion was filed after the December 15, 2003 deadline in the court's August 22, 2003 scheduling order.

II.

According to her deposition, the debtor was born August 27, 1966, is 37 years of age, and divorced, with an 18 year

old son who lives in Iowa and for whom she provides no financial support. She is healthy and has no medical conditions which impair her ability to work. She holds a bachelor of science degree in accounting, having graduated in 1996 from a state university in Missouri.

After graduation, the debtor worked a series of different jobs,[1] with her hourly wages ranging from a low of $5.97 to a high of $10.19. Since March 2003, the debtor has been employed by a management group in Johnson City, Tennessee that does accounting work for doctors and dentists' offices. The debtor stated in her deposition taken on September 23, 2003 that she will make about $20,000 from her job in 2003, as she works 40 hours a week at an hourly wage of $10. Her health insurance is fully subsidized by her employer and her

[1]The debtor's first job after graduation was at a hospital in Iowa from December 1997 through September 1999 and then at a receivables company from September 1998 to March 1999, with the debtor leaving the company's employment when it relocated to Nebraska. The debtor then worked at a boys' home in Missouri until May 2000 when she divorced and relocated to Johnson City, Tennessee, where she obtained employment with a pharmaceuticals company. After working there four months, the debtor lost her job when the company began cutting back on staff. The debtor collected unemployment benefits until January 2001, when she began working for a doctors' office. She remained there until May 2002, when she quit her job to relocate to another state in anticipation of getting married. After that relationship ended, the plaintiff obtained temporary employment for August and September 2002 but thereafter collected unemployment benefits for the following six months.

employer will contribute to a retirement plan on her behalf after she has been employed one year.

The debtor is a native of Kingsport, Tennessee and returned to this area from the Midwest after divorcing in 2000. Upon her return, the debtor's father arranged for the purchase of a home for her. To pay her father for the home, the debtor signed a non-interest bearing promissory note in favor of her father in the amount of $68,000, secured by a lien on the property. The note provides for monthly payments of $350 and will be forgiven upon the death of both of the debtor's parents.

According to Exhibit D to the United States' memorandum, from November 2000 through September 2003 the debtor's net monthly income ranged from $459 to $1810, with no income in June and July 2002. The debtor's monthly expenses during this same time frame ranged from $573.05 to $2009.47.

The debtor also received tax refunds of $2,877 and $1,958.48 in May 2001 and March 2002, respectively. A tax refund of $1226.18 which the debtor would have received in 2003 for 2002 was intercepted by the Internal Revenue Service and applied to her student loan obligation to the United States. The debtor's other sources of money during this time period include a cash gift of $5,000 from her father in

December 2002, the father's purchase of a computer and printer for the debtor at an approximate cost of $800, and the father's repair of the debtor's home air conditioning system during the summer of 2003 at a cost of $1,236. In addition, during the six-month period from October 2002 through March 2003, Mr. Conant waived the $350 monthly house payment which the debtor was required to pay him under the terms of the promissory note.

As set forth in the United States' statement of facts, the debtor borrowed $5500 from the United States on August 5, 1995. The balance on this debt as of December 12, 2003 was approximately $6500, which sum accrues interest at the rate of 4.22% per annum. Other than the involuntary application of her 2002 tax refund to this obligation, the debtor has made no payments on this debt.

As to the debtor's obligations to ECMC, the balance on this debt, according to ECMC's memorandum of law, is $28,982.36, with interest accruing at 5.25%. ECMC asserts that the debtor has not made any payments on these student loans. To support this assertion, ECMC observes that when the debtor was requested to produce "any and all documents evidencing that [the debtor has] made a good faith effort to repay ECMC's student loan or loans," the debtor's response was

"None, the Debtor, has, in good faith, had an inability to repay these loans on any regular and consistent basis in the past." In her deposition, the debtor testified that she offered at one time to make $50 payments on one of her student loans but the offer was refused. The debtor also testified that she had requested and been granted repayment deferments "all the way up until the point I couldn't do it any more." The debtor acknowledged that the main reason she filed bankruptcy was because of her student loan debts.

When questioned in her deposition as to the basis of her assertion that repayment of the student loans would impose an undue hardship, the debtor responded, "Month to month - some months I have excess money, some months I have to rely on what I had from last month to pay my bills. They are just - by the time that my bills are paid there is hardly anything left over for anything else." Asked if she had considered moving elsewhere to find a better paying job, the debtor said, "No, being away from my family in Tennessee all those years, I am just happy to be back with them, just where I'm from." Later in the deposition when asked if she could find a second job to relieve some of the financial stress, the debtor replied, "I honestly don't think I could" and gave a similar answer when asked if any of her expenses could be cut to free up more

money. Lastly, when questioned as whether there was anything she could do to maximize her income above what it is right now, such as look for a better job elsewhere or work two jobs, the debtor said, "I could. I just honestly tell you I love what I am doing now. This is the first job I have ever had that I love to go to work and do exactly what I'm doing.... I could look for a better job, and at some point I might go ahead and intensely look for something else."

III.

Section 523(a)(8) of the Bankruptcy Code provides:

> A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt ... for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8).

The Sixth Circuit Court of Appeals has observed that "Congress has not defined 'undue hardship,' leaving the task to the courts. Courts universally require more than temporary financial adversity and typically stop short of utter

hopelessness." *Tennessee Student Assistance Corp. V. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998). Although the Sixth Circuit has visited the student loan dischargeability issue on three occasions, it has declined to adopt any one test to measure undue hardship, opting instead for a multi-factor approach. *See id.* citing *Rice v. United States (In re Rice*), 78 F.3d 1144, 1149 (6th Cir. 1996); *Cheesman v. Tennessee Student Assistance Corp.* (*In re Cheesman*), 25 F.3d 356, 359 (6th Cir. 1994). The court noted that it has considered the three factors set forth in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987), "which is the test that has been most widely applied." *In re Hornsby*, 144 F.3d at 437. These factors require the debtor to demonstrate

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) that the debtor has made good faith efforts to repay the loans.

Id. quoting *Brunner,* 831 F.2d at 396.

In *Rice*, the precise issue before the Sixth Circuit Court of Appeals was the "significantly more stringent" unconscionability standard applied in discharge of Health

Education Assistance Loans ("HEAL"), which standard places a heavier burden on a debtor seeking discharge. *Hornsby*, 144 F.3d at 437, n.7. The *Hornsby* court observed, however, that "[t]he factors noted in *Rice* are also relevant in evaluating discharge of ordinary student loans." *Id*.

According to the *Rice* decision,

> the bankruptcy court should be guided principally by such objective factors as the debtor's income, earning ability, health, educational background, dependents, age, accumulated wealth, and professional degree. [cites omitted]. Of course, the court should consider the amount of the debt ... as well as the rate at which interest is accruing. We also believe that the court should examine the debtor's claimed expenses and current standard of living, with a view toward ascertaining whether the debtor has attempted to minimize the expenses of himself and his dependents. [cites omitted]. In addition, the court should examine whether, and to what extent, the debtor's current situation is likely to continue or improve. [cite omitted]. As part of its examination, the court should further determine whether the debtor has attempted to maximize his income by seeking or obtaining stable employment commensurate with his educational background and abilities. [footnote omitted]. Even if the debtor is already employed full-time, the court should consider whether the debtor is capable of supplementing his income through secondary part-time or seasonal employment. [cite omitted] .... And finally, the court should examine the debtor's previous efforts to repay the [student loan] obligation, including the debtor's financial situation over the course of time when payments were due; the debtor's voluntary undertaking of additional financial burdens despite his knowledge of his outstanding [student loan] debt; and the percentage of the debtor's total indebtedness represented by student loans. In other words, we

> believe the debtor's good faith to be an appropriate and necessary consideration. [cite omitted]. We stress, however, that the debtor's good faith or lack thereof should be determined principally with reference to the objective circumstances which we have identified.

Rice, 78 F.3d at 1149-50. It appears to be widely accepted that the debtor has the burden of proof on the issue of undue hardship. *See e.g. Myers v. Fifth Third Bank (In re Myers)*, 280 B. R. 416, 420 (Bankr. S.D. Ohio 2002).

IV.

Application of the various *Brunner* and *Rice* factors to the facts of the present case leads this court to conclude that undue hardship does not exit. As noted, the first *Brunner* factor which the debtor must demonstrate is that she can not maintain, based on her current income and expenses, a minimal standard of living if forced to repay the loans. Other factors suggested by Rice which are relevant in this regard are whether the debtor has minimized her expenses and sought to maximize her income. The evidence submitted in this case indicates that the debtor does satisfy this criteria.

The debtor’s statement of income and expenses attached as Exhibit D to the United States’ memorandum of law reveals that from March 2003 when the debtor obtained her current job

through August 2003 the last month for which income was provided, the debtor's monthly take-home wages averaged $1,417.[2] Her monthly expenses during 2003 averaged $1,398.[3] Included in these expenses was an average monthly phone bill of $149.23 in 2003 for the debtor's home phone and a cell phone.[4] The debtor testified in her deposition that her home phone was $45 per month and long distance was $11 per month. Thus, savings of $93 from her phone bill alone could be achieved if the cell phone, an expense unnecessary for the support of the debtor, were eliminated. The expense statement also indicated that the debtor spent an average of $58.67 per month on gifts in 2003, a monthly average of $48.43 in 2002, and a monthly average of $90.02 from November 2000 through December 2001.[5] The debtor paid $43.47 per month for cable

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[2]Although the debtor's expenses for September 2003 were listed on the statement, her income was not.

[3]In computing this figure, the court included as an expense the debtor's $350 monthly house payment even though her father forgave the payments for the months of January, February, and March 2003. The court did not include the $2305 amount paid by the debtor to her attorney for fees in this dischargeability proceeding since it was a non-recurring expense and was paid out of the debtor's $5000 gift from her father.

[4]Similarly, the debtor's monthly phone expenses in 2002 averaged $143.96.

[5]The court included in this last average the monies the debtor spent on crafts because the statement indicated that the purchased crafts were used to make Christmas/birthday gifts.

and $28.90 monthly for internet service. March 2003's expenses included air fare of $347.50 with a $370.50 air fare expense in February 2002. The court points out these expenses to observe that the debtor could undertake certain belt-tightening measures even though her overall spending habits are modest.

Similarly, the evidence establishes that the debtor has failed to maximize her income. The debtor gave no objective reason as to why she could not take on a second, part-time or seasonal job to supplement her income. She is healthy, relatively young, and has no dependents. A second job of only ten hours per week at minimum wage would produce additional income in excess of $150 per month.

In addition, it is highly questionable whether the debtor has maximized her income as an accountant. She conceded that she could look for a better job and suggested that she might do so at some point but chooses not to do so now because she is comfortable in the position and is near family. Yet, clearly, the debtor is no stranger to living somewhere other than East Tennessee. During the 1990's, she attended college and worked in both Iowa and Missouri. As recently as May 2002, the debtor quit the job which she had in this area because of a planned relocation to another state in

anticipation of remarrying. Her present decision to remain in this area at a lower paying job appears to be a voluntary one rather than one beyond her control.

As stated by one court when faced with a similar factual situation:

> The evidence indicated that the Debtor could, but had chosen not to, relocate to an area where there may be greater demand for her services, and that familial support would be greater in one such place . . . . Such choices are hers to make; they are not, however, choices whose consequences should be borne by [the student loan guarantor]. It has aptly been stated that, "Informed free choice of one's chosen pursuits is to be respected and even encouraged, but not to the extent of the judicial forgiveness of debt because of hardships that are both foreseeable and voluntarily assumed."

New Jersey Higher Educ. Assistance Authority v. Zierden-Landmesser, 249 B.R. 65, 70 (Bankr. M.D. Penn. 2000) quoting *Fischer v. State Univ. of New York*, 23 B.R. 432, 433 (Bankr. W.D. Ky. 1982).

The debtor can repay her student loan obligations if she reduces her expenses by $100 per month and increases her income in excess of $150 per month from a part-time or better-paying job. As set forth in the debtor's response to the United States' summary judgment motion, the ECMC debt can be repaid over 20 years at $195.30 per month. The debt to the United States of $6500 with 4.22% interest would be repaid if

monthly payments of $66.49 were made over ten years. Furthermore, the debtor's home will be fully paid for in thirteen years, allowing her to apply the monies which are presently being paid on her home to her student loan debts.

Consideration of this same evidence illustrates the absence of proof supporting the second *Brunner* factor: that additional circumstances exist which indicate that the debtor's current financial situation is unlikely to change. One court has observed that

> Implicit in this requirement is the concept that the debtor's distressed state of financial affairs be the result of events which are clearly out of the debtor's control; that is, the debtor must establish that they [sic] have done everything in their [sic] power to improve their [sic] financial situation. [cite omitted]. The clear purpose of this requirement is to ensure that the hardship the debtor is experiencing is actually "undue." [cite omitted].

Stupka v. Great Lakes Ed. (In re Stupka), 302 B.R. 236, 242 (Bankr. N.D. Ohio. 2003).

As previously noted, the debtor is healthy, has a college degree with marketable skills, and there is no impediment to her moving to obtain a better paying position, other than her subjective desire to stay where she is. As such, this court is unable to conclude that the debtor's current financial circumstances are permanent or that she has done everything in her power to improve her financial condition.

The third *Brunner* element is that the debtor has made a good faith effort to repay her student loans. As noted by the Sixth Circuit Court of Appeals in *Rice*, good faith or lack thereof must be determined by objective rather than subjective factors, including the debtor's efforts to repay the debt and the percentage of the debtor's total indebtedness represented by student loans. *Rice*, 78 F. 3d at 1150. Applying these objective factors to the case at hand leads to the conclusion that the debtor lacks good faith. The debtor's student loan obligations represent 99% of her unsecured debt and she acknowledged that the reason she filed bankruptcy was to discharge her student loans. Although the debtor did not seek bankruptcy relief immediately upon graduation from college, she has made no effort to repay the loans. Granted, her sporadic employment during most of the past six years made repayment difficult and it is understandable why the debtor sought and obtained deferments from repayment. However, upon obtaining her current, stable employment, the debtor chose to seek forgiveness of the indebtedness through this adversary proceeding rather than investigate whether there were any repayment options which would be commensurate with her income, such as the government's Income Contingent Repayment Plan. *See McLeod v. Diversified Collection Services (In re McLeod)*,

266 B.R. 800, 807 (Bankr. N.D. Ohio 1994)(holding that the debtor did not act in good faith when he failed to negotiate repayment before seeking a discharge of his student loan obligation in bankruptcy). Nor did the debtor pay on her student loans when she had extra cash available to her, such as her income tax refunds and the $5000 gift from her father. All of the foregoing, along with the debtor's age, health, and failure to minimize her expenses and maximize her income, indicate a lack of good faith.

V.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

> In reviewing a motion for summary judgment, [the court] must view the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party. To withstand summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. [cite omitted]. A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the

> [non-movant]." [cite omitted]. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [cite omitted].

Prebilich-Holland v. Gaylord Entertainment Co., 297 F.3d 438, 442

(6th Cir. 2002). Therefore, in order for the defendants to prevail on summary judgment, they must demonstrate that material facts are not in dispute and that the debtor will be unable to meet her burden of proof at trial. *See Newman v. Education Credit Management Corp. (In re Newman)*, 2002 WL 32311459, *5 (Bankr. E.D. Pa. Jan. 3, 2002).

As the debtor conceded in her Memorandum of Law, she does not dispute the facts set forth in the United States' memorandum or exhibits. She asserts, however, that "the Government has not shown the 'totality of the circumstances' of the Debtor's situation" and observes that "it is almost impossible for the Debtor to recreate all the testimony she is expected to give in this matter in the form of an affidavit." Accordingly, she requests that the court deny the defendants' summary judgment motions so that she will have an opportunity to appear in court and testify as to the totality of her circumstances.

The debtor's argument misses the mark. As noted, she bears the burden of proof on the issue of undue hardship and in the face of a summary judgment motion can not rest on mere allegations. It is incumbent upon her to introduce evidence in the form of an affidavit or otherwise, that a material issue of fact exists. The absence of such proof, along with her acknowledgment that the facts as represented by the defendants are true, lead this court to conclude that no genuine issue material fact exists which would preclude summary judgment.

Furthermore, these undisputed facts clearly indicate to the court that the debtor will be unable to meet her burden of proof at trial. A determination as to whether a student loan imposes an undue hardship is a question of law. *Cheesman*, 25 F. 3d at 359. The court concludes that the defendants are entitled to judgment as a matter of law based on the facts set forth herein.

The court reaches this conclusion, notwithstanding its equitable authority to utilize its 11 U.S.C. § 105(a) powers to partially discharge the student loans regardless of the debtor's failure to demonstrate undue hardship as to the entire student loan obligation. *See Hornsby*, 144 F.3d at 438-440.

> However, before this Court will invoke its equitable powers under § 105(a), it must find that the equities of the situation tip distinctly in favor of the debtor. [cites omitted]. A primary concern in this regard, given the equitable nature of § 105(a), is whether the debtor, in seeking relief from this court, acted fairly with respect to their student loan. [cite omitted].

In re Stupka, 302 B.R. at 246.

Given the debtor's inability to satisfy any of the *Brunner* factors, the court does not find that the equities tip in favor of the debtor. The court recognizes that the bankruptcy court in *Stupka* made an equitable adjustment of her student loan obligations even though she had failed to satisfy the good-faith component of *Brunner*. *Id*. At 246. The *Stupka* court concluded, however, that because the good faith determination had been a "close call," an equitable adjustment was appropriate. *Id*. The instant case, on the other hand, is not a close call, either on good faith or any of the other *Brunner* or *Rice* criteria.

In making this determination, the court is not unsympathetic to the debtor's financial situation and is aware that repayment of the student loans, even if the debtor obtains a better-paying job, will be difficult and a hardship. Congress, however, has limited discharge of student loans to

situations that impose an "undue" hardship, thus evidencing a strong legislative policy against allowing the discharge of student loans in bankruptcy. *Healey v. Massachusetts Higher Education (In re Healey)*, 161 B.R. 389, 393 (E.D. Mich. 1993).

Because there is no genuine issue of material fact and the debtor will be unable to carry her burden of proof as to undue hardship at trial, the court will enter, in accordance with this memorandum opinion, an order granting the defendants' summary judgment motions.

FILED: February 13, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE